Customs Bulletin

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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decision

19 CFR Part 12

(T.D. 90–37)

IMPORT RESTRICTIONS IMPOSED ON SIGNIFICANT ARCHAEOLOGICAL ARTIFACTS FROM PERU

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to reflect the imposition of emergency import restrictions on culturally significant archaeological artifacts from the Sipan Region of Peru. These restrictions have been imposed pursuant to a determination of the United States Information Agency issued under authority of the Convention on Cultural Property Implementation Act in accordance with the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

EFFECTIVE DATE: May 7, 1990.

FOR FURTHER INFORMATION CONTACT:

Legal Aspects: Samuel Orandle, Commercial Rulings Division (202) 566–5765.

Operational Aspects: Pamela Wenner, Trade Operations (202) 535–4931. Both are at U.S. Customs, Washington, D.C. 20229.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's origin, history, and traditional setting. The importance and popularity of such items regrettably make them targets of theft, encourages clandestine looting of archaeological sites, and results in their illegal export and import.

The U.S. shares in the international concern for the need to protect endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries where there has been pillage has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of museum, archaeological, and scholarly communities, was recognized by the President and Congress. It became apparent that it was in the national interest for the U.S. to join with other countries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in deliberations resulting in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub.L. 97–446, 19 U.S.C. 2601 *et seq.*). The spirit of the Convention was enacted into law to promote U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance not only to the nations whence they originate, but also to greater international understanding of mankind's common heritage. The U.S. is, to date, the only major art importing country to implement the 1970 Convention.

It was with these goals in mind that Customs issued interim regulations to carry out the provisions of the Act. The interim regulations, which were set forth in § 12.104, Customs Regulations (19 CFR 12.104), were published in the Federal Register as T.D. 85–107 on June 25, 1985 (50 FR 26193), and took effect immediately. After consideration of comments received on the interim regulations, final regulations were issued as T.D. 86–52, published in the Federal Register on February 27, 1986 (51 FR 6905), and took effect on March 31, 1986. Those regulations were again amended on January 19, 1990 (55 FR 1809), by T.D. 90–3 which provided members of the public a listing of all T.D.s which had been issued imposing import restrictions under the Act. Both the country where the article originates and a highlight of the type of article covered appear next to the T.D.

This document amends the regulations again by adding additional cultural property to the list of articles for which import restrictions exists.

PERU

Under § 303(a)(3) of the Cultural Property Implementation Act (19 U.S.C. 2602(a)(3)), the Government of Peru, a State Party to the 1970 UNESCO Convention, asked the U.S. Government to impose emergency import restrictions on certain archaeological materials from the Sipan Archaeological Region of Peru, which material was identified as comprising part of Peru's cultural patrimony pillaged,

or in danger of being pillaged, in crisis proportions. Notice of receipt of this request was published by the U.S. Information Agency (USIA) in the Federal Register on June 23, 1989 (54 FR 26462).

On June 23, 1989, the request was referred to the Cultural Property Advisory Committee, which conducted a review and investigation, and submitted its report in accordance with the provisions of 19 U.S.C. 2605(f) to the Deputy Director, USIA, on September 20, 1989. The Committee found the situation in Peru to be an emergency, in accordance with the provisions of 19 U.S.C. 2603(a)(2) and (3), and recommended that emergency import restrictions be imposed on archaeological material from the Sipan Archaeological Region. The Deputy Director, pursuant to the authority vested in him under Executive Order 12555 and USIA Delegation Order 86–3, considered the Committee's recommendations and made the determination that emergency import restrictions be applied. (See this issue of the Federal Register.)

The Commissioner of Customs, in consultation with the Deputy Director of the USIA, has drawn up a list of types of covered archaeological material from the Sipan Archaeological Region of Peru. The materials on the list are subject to § 12.104a(b), Customs Regulations. As provided in 19 U.S.C. 2601 *et seq.*, and § 12.104a(b), Customs Regulations, listed material from this area may not be imported into the U.S. unless accompanied by documentation certifying that the material left Peru legally and not in violation of the laws of Peru.

In the event an importer cannot produce the certificate, documentation, or evidence required by § 12.104c, Customs Regulations, at the time of making entry, § 12.104d provides that the district director shall take custody of the material until the certificate, documentation, or evidence is presented. Section 12.104e provides that if the importer states in writing that he will not attempt to secure the required certificate, documentation, or evidence, or the importer does not present the required certificate, documentation, or evidence to Customs within the time provided, the material shall be seized and summarily forfeited to the U.S. in accordance with the provisions of Part 162, Customs Regulations (19 CFR Part 162).

Archaeological Material from the Sipan Archaeological Region Forming Part of the Remains of the Moche Culture

Artifacts from the Sipan Region are known to fall into the categories listed below. As this region is further excavated, it is expected that other types of material will be discovered.

I. METAL

(Dimensions are for height)

A. *Gold:*

1. Small masks, human or feline, some with rattle inside, 2–13cm.
2. Disk-shaped ear ornaments with beaded edges.
   (a) With figural inlay of turquoise or shell.
   (b) Simple, nonfigurative, sometimes with danglers.
3. Nose ornaments, usually crescent-shaped, some with metal danglers.
4. Necklaces.
   (a) Peanut-effigy necklace.
   (b) Peanut-effigy beads, 5–13 cm.
   (c) Round beads, 1–3 cm.
5. Crowns or diadems.
6. Heads or scepters and/or sacrificial knives, with scenes.
7. Small disks, 1.5–5 cm.
8. Rattles, semicircular or trapezoidal, usually with scenes; attached to copper tool.
9. Axe-shaped objects with figures, often with rattle, 20–45 cm.
10. Knives, or *tumis*, simple or figural, 8–15 cm.
11. Human figures, 10–30 cm.
12. Necklace pendants of various forms, including small spiders.
13. Human and animal heads, with turquoise and/or shell and/or metal danglers, probably headdress ornaments.
14. Bracelets, or anklets, single sheet with designs.
15. Small effigy idols, with hooks for attachment.
16. Funerary masks, made from a single sheet.
17. Flutes.
18. Headdress ornaments, crescent-shaped, open with figures attached.
19. Pendants or attachments with "sacrificer" figure and beaded edge.

B. *Gilded Copper:*

1. Small masks, feline, 5–16 cm.
2. Nose ornaments, usually crescent-shaped, some with metal danglers.
3. Rattles, semicircular, usually with figures.
4. Axe-shaped objects, with figures, often with rattle, 20–45 cm.
5. Scepters, usually geometric, 5–20 cm.
6. Crowns or diadems with hands and a central figure, 20–45 cm.
7. Human figures, 10–30 cm.
8. Necklace pendants, various.
9. Human and animal heads, with turquoise and/or shell and/or metal danglers, probably headdress ornaments.

10. Small effigy idols, with hook for attachment.
11. Funerary masks, single sheet.
12. Owl heads.
13. Pendants or attachments with "sacrificer" figure and beaded edge.

C. *Silver:*

1. Small masks human.
2. Nose ornaments, usually crescent-shaped, some with metal danglers.
3. Necklaces, peanut and plain beads.
4. Heads of scepters or sacrificial knives, with scenes.
5. Rattles, semicircular, usually with figures.
6. Axe-shaped objects, with figures, often with rattle, 20–45 cm.
7. Knives, or *tumis*, simple or figural, 8–15 cm.
8. Scepters, usually geometric, 5–20 cm.
9. Human figures, 10–30 cm.
10. Necklace pendants.
11. Human and animal heads, with turquoise and/or shell and/or metal danglers, probably headdress ornaments.
12. Bracelets or anklets, single sheet.
13. Small effigy idols, with hook for attachment.
14. Funerary masks.

D. *Copper:*

1. Masks.
2. Knives, or *tumis*, simple or with figure, 8–15 cm.
3. Scepters, usually geometric, 5–20 cm.
4. Clubs.
5. Disks.
6. Owl heads.
7. Tweezers.
8. Lance tips.
9. Tools with elaborate scenes on top.

II. Ceramics

A. *Stirrup-Spout Vessels:*

1. Seated figures with headdress.
2. Owls.
3. Reptiles.

B. *Open-Spout Vessels:*

1. Seated Figures.
2. Prisoners.
3. Warriors.
4. Animals.

III. MISCELLANEOUS

A. Textile fragments (often with copper platelets).
B. Copper platelets and textile fragments.
C. Feathers, remains of feathered ornaments.
D. Beads of turquoise and shell.
E. Fragments of shell (Spondylus) ornaments.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

Because this amendment imposes emergency import restrictions on cultural property which is currently subject to pillage and looting, pursuant to § 553(b)(B) of the Administrative Procedure Act, no notice of proposed rulemaking or public procedure is necessary. For the same reason, a delayed effective date is both impracticable and contrary to the public interest.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, Office of Rules and Regulations, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 12

Customs duties and inspections, Imports, Cultural property

AMENDMENT TO THE REGULATIONS

Part 12 of the Customs Regulations (19 CFR Part 12) is amended as set forth below:

PART 12—[AMENDED]

1. The general and specific authority citation for Part 12 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General note 8, Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

* * * * * * *

Sections 12.104–12.104i also issued under 19 U.S.C. 2612.

2. In § 12.104g, the list of emergency actions imposing import restrictions on described articles of cultural property is amended by adding "Peru" under the column headed "State Party", the description "Archaeological material from the Sipan Archaeological Region forming part of the remains of the Moche culture" under the column headed "Cultural Property", and "TD 90–37" on the same line as "Peru", in the column headed "T.D. No."

CAROL HALLETT,
Commissioner of Customs.

Approved: April 9, 1990.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, May 7, 1990 (55 FR 19029)]

U.S. Customs Service

General Notice

19 CFR Part 113

ACCEPTANCE OF BONDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This Notice informs the public that new bonds underwritten by Travelers Indemnity Company will be accepted in the Southwest Region by virtue of the Regional Commissioner's lifting of sanctions imposed under 19 CFR 113.38.

FOR FURTHER INFORMATION CONTACT:

Theodore F. Doyle
U.S Customs Service
5850 San Felipe St., Suite 500
Houston, Texas 77057–3012
(713–953–6964)

SUPPLEMENTARY INFORMATION: Under 19 CFR 113.38(c)(2), the Regional Commissioner of Customs, Southwest Region refused to accept any new bonds underwritten by the Travelers Indemnity Company. A General Notice dated January 29, 1990, was published in the February 14, 1990 issue of the Customs Bulletin. The Regional Commissioner has since lifted the sanctions imposed upon the surety, thereby permitting the acceptance of new bonds. The Regional Commissioner notified the surety of its action by letter dated April 12, 1990, the test of which follows:

APRIL 12, 1990

TRAVELERS INDEMNITY COMPANY
One Tower Square
Hartford, CT 06183

ATTN: Frank Bogdan

DEAR SIR:

This correspondence is to notify the Travelers Indemnity Company that the sanctions imposed by the Customs Service, Southwest Region, have been removed and that new bonds will be accepted, effective 12:01 a.m., CST, Friday, April 13, 1990.

A copy of this notice is being sent to the Director, Carriers, Drawback and Bonds Division, Customs Headquarters, Washington, D.C., for publication in the Customs Bulletin. Notice will also be given to the importing public by posting a copy of this decision in the Southwest Region Customhouses.

If you have any questions, you may call Theodore F. Doyle, Operations Officer, Southwest Region, at (713) 953-6964.

Sincerely,
JAMES C. PIATT,
Regional Commissioner.

The Regional Commissioner has notified this Headquarters of his action. This Notice hereby notifies the public of that action.

Dated: April 26, 1990.
File: BON-1-02
222306

MARVIN M. AMERNICK,
(for Jerry Laderberg,
Acting Director,
Commercial Rulings Division.)

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 133

WITHDRAWAL OF PROPOSED CUSTOMS REGULATIONS AMENDMENT RELATING TO NOTIFICATION TO COPYRIGHT OWNERS OF IMPORTATION OF LAWFULLY MADE COPIES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Withdrawal of proposed rule.

SUMMARY: This document withdraws a proposal to amend the Customs Regulations to provide for notification to copyright owners of the importation of lawfully made copies or phonorecords of copyrighted works. The proposal was made pursuant to the Copyright Act of 1976 which authorized the Secretary of the Treasury to prescribe a procedure pursuant to which any person claiming an interest in a copyrighted work may be notified of the importation of articles that appear to be copies or phonorecords of the work. After careful analysis of the comments received in response to the proposal, Customs has determined that the operational burden of providing such notice to the numerous copyright holders is too great a strain on limited Customs resources. Accordingly, the proposal is being withdrawn.

EFFECTIVE DATE: Withdrawal effective May 2, 1990.

FOR FURTHER INFORMATION CONTACT: Samuel A. Orandle, Value, Special Programs & Admissibility Branch (202–566–2938).

SUPPLEMENTARY INFORMATION:

Background

Several provisions of the Copyright Act of 1976 (Pub. L. 94–533, 17 U.S.C. 101–810) ("The Act") directly affect procedures of the Customs Service relating to the importation of copyrighted works.

To conform the Customs Regulations to the Copyright Act of 1976, a notice was published in the Federal Register (43 FR 31245), on July 7, 1983, proposing to amend Part 133, Customs Regulations (19 CFR Part 133), which relates to trademarks, tradenames and copyrights. In this document, Customs did not propose to notify

copyright owners of the importation of articles that appear to be copies or phonocopies of their works, whether they be lawfully made or piratical. Customs believed there was no need to notify copyright owners of the importation of piratical copies because those copies are either seized, forfeited and destroyed by Customs, or ordered returned to the copyright owner. Accordingly, they represent no threat to the copyright owner. Customs also did not, at that time, propose a notification procedure for the importation of lawfully made copies because there was thought to be little demand by copyright owners for notification of these imports.

Comments received in response to this proposal indicated that some copyright owners did desire notification when copies or phonorecords are imported. In order to obtain further information, Customs published another notice of proposed rulemaking in the Federal Register (52 FR 9498), on March 25, 1987. In this document, Customs reaffirmed its belief that notice is not necessary for piratical copies but proposed that notification be provided for the importation of lawfully made copies and invited public comment.

DETERMINATION

The adoption of the initiative would require Customs import specialists to review entry documentation for all copyrighted protected works and to obtain and transmit the information to the copyright holder. Such a project would require a significantly large allocation of resources. Moreover, the procedure would run counter to the efforts of Customs at automating the entry process by reducing the number of shipments that could be eligible for bypass procedures.

Upon further consideration of the matter, Customs has determined that the resources of Customs could more efficiently be allocated to detaining and seizing unlawfully made copies, in conjunction with enforcing copyright violations. Accordingly, Customs has decided to withdraw the proposal.

DRAFTING INFORMATION

The principal author of this document was Earl W. Martin, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

CAROL HALLETT,
Commissioner of Customs.

Approved: April 17, 1990.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, May 2, 1990 (55 FR 18353)]

19 CFR Part 122

RIN 1515–AA69

WITHDRAWAL OF PROPOSED AMENDMENT TO CUSTOMS REGULATIONS RELATING TO FINGERPRINTING REQUIREMENT FOR OVERFLIGHT EXEMPTION APPLICANTS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of withdrawal.

SUMMARY: This document withdraws a proposed amendment to the Customs Regulations which would have required fingerprinting as part of the application process for all usual and anticipated pilots and crewmembers seeking overflight exemptions for flights that did not involve either air ambulance operations or the nonemergency transport of persons seeking medical treatment in the U.S. The proposal was made in a Federal Register document published on January 24, 1989. Due to the negative response from commenters and the logistical problems Customs would face in implementing the proposal, Customs has decided to withdraw the proposal.

DATE: Withdrawal effective May 2, 1990.

FOR FURTHER INFORMATION CONTACT: Esther Mandelay, Office of Passenger Enforcement and Facilitation (202–566–5607).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 24, 1989, Customs published a document in the Federal Register (54 FR 3490), proposing that applicants for overflight exemptions be required to be fingerprinted. It was proposed that § 122.25, Customs Regulations (19 CFR 122.25) be amended to state that except for flights involving air ambulance operations and the non-emergency transport of persons seeking medical treatment, all usual and anticipated pilots and crewmembers on flights applying for overflight exemptions must submit fingerprints. It was thought that a fingerprinting requirement would improve the overflight exemption program by enhancing Customs ability to investigate the background of overflight applicants.

Eight comments were received in response to the document. Most of the commenters were opposed to the proposal, believing it to be an unnecessary intrusion as thee is no evidence that such a requirement would curtail illegal drug trafficking. It was also stated that such a requirement would not be cost-effective.

After careful consideration of all the comments received and further review of the matter, Customs agrees with the majority of commenters that requiring fingerprints and successfully ensuring that the fingerprints on file are those of the actual pilot or crewmember on a flight seeking an overflight exemption may not be a cost-effective way of curtailing drug trafficking. Accordingly, based on both

the negative response from commenters and the logistical problems Customs perceives would be caused by implementing this fingerprinting proposal, the proposal is withdrawn.

DRAFTING INFORMATION

The principal author of this document was Harold M. Singer, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

CAROL HALLETT,
Commissioner of Customs.

Approved: April 9, 1990.

JOHN P. SIMPSON,
Acting Assistant Secretary of the Treasury.

[Published in the Federal Register, May 2, 1990 (55 FR 18352)]

U.S. Court of Appeals for the Federal Circuit

AMGEN, INC., APPELLANT *v.* U.S. INTERNATIONAL TRADE COMMISSION, APPELLEE, CHUGAI PHARMACEUTICAL CO., LTD. AND CHUGAI PHARMA U.S.A., INC., INTERVENORS

Appeal No. 89-1523

(Decided April 27, 1990)

S. Leslie Misrock, Pennie & Edmonds, of New York, New York, argued for appellant. *D. Dennis Allegretti*, *Jon O. Nelson*, *John J. McDonnell*, and *Paul H. Berghoff*, Allegretti & Witcoff, Ltd., of Chicago, Illinois, were on the brief for appellant. Also on the brief were *Paul Plaia, Jr.*, *Cecilia H. Gonzalez*, Howrey & Simon, of Washington, D.C., and *Robert D. Weist* and *Steven M. Odre*, Amgen, Inc., of Thousand Oaks, California, of counsel.

Jean H. Jackson, Office of the General Counsel, U.S. International Trade Commission, of Washington, D.C., argued for appellee. With her on the brief were *Lyn M. Schlitt*, General Counsel, *James A. Toupin*, Assistant General Counsel and *Abigail A. Shaine*.

Kurt E. Richter, Morgan & Finnegan, of New York, New York, argued for intervenors, Chugai Pharmaceutical Co., Ltd., Chugai Pharma U.S.A., Inc. With him on the brief were *Eugene Moroz*, *William S. Feiler*, *Michael P. Dougherty* and *Valerie Fedowich*. Also on the brief were *Will E. Leonard*, *Jon F. Tuttle*, *Jonathan Hemenway Glazier*, *Edward R. Easton*, *Philippe M. Bruno* and *Kenneth J. Nunnenkamp*, Dorsey & Whitney, of Washington, D.C., of counsel.

Mary Helen Sears, *Peter M. Kirby* and *William J. McNichol, Jr.*, Ginsburg, Feldman & Bress, Chartered, of Washington, D.C., were on the brief for Amicus Curiae, Mayflower Imports, Inc.

Appealed from: U.S. International Trade Commission.

Before RICH, *Circuit Judge*, FRIEDMAN, *Senior Circuit Judge*, and ARCHER, *Circuit Judge*.

RICH, *Circuit Judge*.

Amgen, Inc. (Amgen) appeals from the April 10, 1989 Order of the United States International Trade Commission (Commission), Inv. No. 337-TA-281 entitled *Certain Recombinant Erythropoietin*, 10 USPQ2d 1906 (USITC 1989), dismissing its complaint for lack of subject matter jurisdiction. We vacate and remand.

BACKGROUND

Erythropoietin is a hormone which controls the synthesis of red blood cells in bone marrow and which is useful for treating patients suffering from anemia. Because the amount of erythropoietin naturally present in humans and animals is very small, it is impractical to obtain erythropoietin from natural sources for the purpose of treating anemia. Therefore, scientists from the emerging field of biotechnology have used recombinant DNA technology to produce genetically-altered cells (host cells) which produce large amounts of erythropoietin. To simplify the recombinant DNA procedure, the particular DNA sequence, or gene, responsible for a desired trait, here the production of erythropoietin, is isolated and removed from human cells. The isolated DNA sequence is then "recombined" with the DNA present in the host cells. As a result, the host cell is genetically-altered so as to express the desired trait: in this case, to produce erythropoietin. Erythropoietin produced in this way is referred to as recombinant erythropoietin, or rEPO, in order to distinguish it from naturally-occurring erythropoietin.

Appellant Amgen is the owner by assignment of U.S. Pat. No. 4,703,008 (the '008 patent), which has claims directed toward recombinant DNA sequences, vectors and host cells used to produce rEPO. The '008 patent contains no claim to the product rEPO itself, and no claim to any process of making rEPO, or any other process.[1]

On January 4, 1988, Amgen filed a complaint with the Commission, alleging that Chugai Pharmaceutical Co. of Japan and its U.S. subsidiary, Chugai Pharma U.S.A., Inc., (collectively Chugai) had violated former sections 337 and 337a of the Tariff Act of 1930 (codified at 19 USC 1337 and 1337a) by importing recombinant erythropoietin (rEPO) made by a process covered by the '008 patent.[2] On February 2, 1988, the Commission voted to institute an investigation, and referred the matter to an Administrative Law Judge (ALJ). During the course of the proceeding, Congress passed, on August 23, 1988, the 1988 Trade Act, which substantially amended former section 337 and repealed former section 337a. Because the Trade Act stated that amended section 337 would apply to all pend-

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[1]The application which matured into the '008 patent originally contained claims to the process of producing rEPO. The Patent and Trademark Office (PTO) Examiner rejected these claims, at least in part, because he considered the claims to be to the application of an old process to new starting materials and thus not patentable on the authority of *In re Durden*, 763 F.2d 1406, 226 USPQ 359 (Fed. Cir. 1985). The process claims were cancelled prior to issuance of the '008 patent.

[2]As discussed later in this opinion, section 337 was amended, and section 337a was deleted, by the Omnibus Trade and Competitiveness Act of 1988 (1988 Trade Act). References in this opinion to "former" sections 337 and 337a are to the versions prior to the 1988 amendments, and are otherwise to the amended versions.

Former section 337 prohibited "[u]nfair methods of competition and unfair acts in the importation of articles into the United States * * *, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States * * *."

Former section 337a reads as follows:

Importation of products produced under process covered by claims of unexpired patent

The importation for use, sale, or exchange of a product made, produced, processed, or mined under or by means of a process covered by the claims of any unexpired valid United States letters patent, shall have the same status for the purposes of section 1337 of this title as the importation of any product or article covered by the claims of any unexpired valid United States letters patent.

ing Commission investigations, Amgen's complaint became one under section 337(a)(1)(B)(ii), which reads as follows:

> **(a) Unlawful activities; covered industries; definitions**
>
> (1) Subject to paragraph (2), the following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section:
>
> * * * * * * *
>
> (B) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—
>
> * * * * * * *
>
> (ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.

The primary issue throughout the proceedings in the Commission was whether the rEPO produced and imported by Chugai is "made * * * by means of a process covered by" a claim of the '008 patent, even though the '008 patent does not contain, as Amgen calls them, "conventional process claims." Amgen presented two related arguments before the ALJ: (1) Chugai's process for producing rEPO necessarily requires the use of Amgen's patented DNA sequences, vectors and host cells, and thus is "covered" by the claims of the '008 patent; and (2) the claims to the host cells are "unique hybrid claims" which cover not only the cells themselves, but also the unique intracellular life processes inherently performed by the host cells.

After conducting a full investigation on the merits, the ALJ delivered an extensive, 188 page Initial Determination on January 10, 1989. While finding that the Commission does have subject matter jurisdiction over Amgen's complaint, the ALJ determined that the claims of the '008 patent do not "cover" Chugai's process for producing rEPO, and thus that no violation of section 337(a)(1)(B)(ii) occurred.

On April 10, 1989, after review of the ALJ's Initial Determination, the Commission, disagreeing with the ALJ on the jurisdiction issue, entered an order terminating the investigation for lack of subject matter jurisdiction. In an accompanying Opinion joined by a majority of four Commissioners, the Commission adopted the ALJ's extensive analysis of the scope of section 337(a)(1)(B)(ii) but concluded that the existence of a process patent claim was a jurisdictional prerequisite for an investigation under section 337(a)(1)(B)(ii). Since, concluded the Commission's April 10 Opinion, the '008 patent does not contain any process patent claims, the Commission must dismiss not on the merits, but for lack of subject matter jurisdiction. This appeal followed.

OPINION

A. *Jurisdiction*

This court's authority to review a decision of the Commission is limited by section 337(c), which states in part:

> Any person adversely affected by a final determination of the Commission under subsection (d), (e), (f), or (g) of [section 337] may appeal such determination * * * to the United States Court of Appeals for the Federal Circuit * * *.

This language has been interpreted as requiring a "final determination decision *on the merits,* excluding or refusing to exclude articles from 'entry' " under section 337(d), (e), (f) or (g). *Block* v. *U.S. Int'l Trade Comm'n,* 777 F.2d 1568, 1571, 228 USPQ 37, 38 (Fed. Cir. 1985) (emphasis in original).[3] Thus, both the Commission and Chugai have filed motions to dismiss on the ground that this court is without jurisdiction to review the Commission's April 10, 1989 Order, since that Order constituted a dismissal for lack of subject matter jurisdiction and not a final determination on the merits.

In response, Amgen contends that the Commission's April 10 Order is intrinsically a final determination not to exclude articles from entry, and thus is appealable under section 337(c). We agree.

The fact that the Commission termed its dismissal as one for lack of subject matter jurisdiction rather than as one on the merits is not dispositive. If this fact were dispositive, then the Commission could effectively shield all negative determinations from judicial review simply by labelling the determination as a dismissal for lack of jurisdiction. Such a result would be clearly contrary to the statutory scheme, which provides for judicial review of both positive and negative determinations.[4] Instead, this court has recognized that when a decision is intrinsically a final determination, i.e., a determination *on the merits,* then that decision is appealable under section 337(c). *Block; Import Motors Ltd.* v. *U.S. Int'l Trade Comm'n,* 530 F.2d 940, 944, 188 USPQ 491, 494 (CCPA 1976).

In *Block,* this court reviewed an Order of the Commission terminating an investigation, initiated on its own motion, after the patent forming the basis for the alleged section 337 violation was substantially amended during reexamination proceedings in the PTO. In concluding that the Order was not an intrinsically final determination, this court found the lack of any findings by the Commission to be critical; nothing in the termination Order prejudiced the Commission or any private party in a future proceeding. *Block,* 777 F.2d at 1571–72, 228 USPQ at 38–39. To the contrary, the Commission in this case made one very important finding: that the claims of the '008 patent do not, in fact, cover a process. This finding clearly

[3] While *Block* was decided with reference to former section 337, none of the parties here argues, and we see no reason to conclude, that the proper interpretation of section 337(c) has been changed.

[4] *See* section 337(c).

reaches the merits of Amgen's complaint and determinatively decides Amgen's right to proceed in a section 337 action; even assuming that the Commission's dismissal is not given res judicata effect,[5] any future action brought by Amgen would necessarily raise the same issue, and would presumably be dismissed for the same reason.

Further, we are of the opinion that the Commission should have treated Amgen's complaint on the merits and not on jurisdictional grounds. As is very common in situations where a tribunal's subject matter jurisdiction is based on the same statute which gives rise to the federal right,[6] the jurisdictional requirements of section 337 mesh with the factual requirements necessary to prevail on the merits. In such a situation, the Supreme Court has held that the tribunal should assume jurisdiction and treat (and dismiss on, if necessary) the merits of the case. *Bell* v. *Hood*, 327 U.S. 678, 682 (1946); *Jackson Transit Authority* v. *Local Division 1285, Amalgamated Transit Union, AFL–CIO–CLC*, 457 U.S. 15, 21 (1982); *see also Do-Well Machine Shop* v. *United States*, 870 F.2d 637, 639–40 (Fed. Cir. 1989).

In *Bell* v. *Hood*, plaintiffs brought suit against the Federal Bureau of Investigation, seeking money damages based on alleged violations of their rights under the Fourth and Fifth Amendments to the Constitution. The District Court dismissed for lack of jurisdiction on the ground that the action did not "arise under the Constitution or laws of the United States." The Supreme Court reversed, holding that since the complaint on its face clearly sought relief based on the Constitution, the District Court must assume jurisdiction to decide whether the allegations state a claim upon which relief can be granted.

> Jurisdiction, therefore, is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief,

---

[5]Dismissals for lack of jurisdiction may be given res judicata effect as to the jurisdictional issue. *See Underwriters Nat'l Assurance Co.* v. *North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1981).

[6]In a concurring opinion issued with the Commission's April 10, 1989 Order, two Commissioners indicated that they would dismiss Amgen's complaint on the merits because they considered the Commission's jurisdiction to be based not on section 337(a)(1) but on section 337(b)(1), which states in pertinent part:

> The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative * * *. The Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time * * *.

Because we conclude that the dismissal of Amgen's complaint should have been on the merits even assuming that jurisdiction is based on section 337(a)(1), we do not reach the question of whether the agency correctly based its jurisdictional grant on section 337(a)(1).

> then dismissal of the case would be on the merits, not for want of jurisdiction.

Bell v. *Hood*, 327 U.S. at 682 (citations omitted).

We deem this analysis to be applicable to the present case. Amgen's complaint alleged that Chugai was importing rEPO and that the rEPO was made by a process covered by the '008 patent; thus, on its face the complaint came within the jurisdiction of the Commission. The fact that Amgen was later unable to sustain these allegations is not material to the issue of *jurisdiction*. We hold that the Commission should have assumed jurisdiction, and, if the facts indicate that Amgen cannot obtain relief under section 337(a)(1)(B)(ii), the Commission should have dismissed on the merits.[7]

The Supreme Court in *Bell* v. *Hood* recognized two exceptions to the above analysis. First, where the alleged claim is immaterial and is brought solely for the purpose of obtaining jurisdiction in a particular forum, dismissal should be jurisdictional and not on the merits. This exception is not applicable here, since, as in *Bell* v. *Hood*, Amgen's complaint under section 337 forms the sole basis of its claim for relief. Second, when the alleged claim is wholly insubstantial and frivolous, then dismissal should likewise be for lack of jurisdiction. As discussed *infra*, though we disagree with Amgen's broad construction of section 337(a)(1)(B)(ii), we cannot say that their complaint is wholly insubstantial or frivolous.

Since the Commission's dismissal for lack of subject matter jurisdiction was intrinsically a final decision on the merits, and should have been phrased as a dismissal on the merits, we hold that this court has jurisdiction to review the Commission's Order. Therefore, the Commission's and Chugai's motions to dismiss are denied.

B. *The Scope of Section 337(a)(1)(B)(ii)*

1. *Are Amgen's Host Cell Claims Unique?*

In its brief, Amgen repeatedly asks us to phrase the issue in this appeal as being "whether section 337(a)(1)(B)(ii) requires traditional process claims." We do not agree that this is, in fact, the issue. However, their formulation of the issue as such begs the following question: does the '008 patent contain any "non-traditional" process

---

[7]The Commission argues that the case of *Federal Trade Comm'n* v. *Raladam Co.*, 283 U.S. 643 (1931) and *Albert* v. *Kevex Corp.*, 729 F.2d 757, 221 USPQ 202 (Fed. Cir. 1984) require a contrary result. We disagree. In *Raladam*, the court expressly distinguished a proceeding initiated *sua sponte* by the Commission from one like the present where one party is challenging the actions of another. *Raladam*, 283 U.S. at 654 ("A proceeding under § 5 is not one instituted before the Commission by one party against another. It is instituted by the Commission itself, * * * and the Commission cannot, by assuming the existence of competition, * * * give itself jurisdiction * * *."). This distinction is consistent with Rule 12 of the Federal Rules of Civil Procedure which requires that the unchallenged allegations of a complaint be construed favorably to the pleader. *See Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). In a proceeding initiated solely by the Commission, there is no complaint to which deference is necessary.

In *Albert*, the jurisdictional finding which the district court failed to make (the existence of interfering patents) did not mesh with the finding on the merits which it did make (that Kevex's patent was invalid). *Albert*, 729 F.2d at 760–62, 221 USPQ at 205–06. In the present case, the jurisdictional finding required under section 337(a)(1)(B)(ii) is the same as one of the findings required to prevail on the merits.

claims? Therefore, before analyzing the scope of section 337(a)(1)(B)(ii), we will first decide whether there is any difference between Amgen's host cell product claims and any other product claim which would merit giving the host cell claims special treatment for the purpose of section 337.

We think there is not. On their face, the host cell claims of the '008 patent are limited to just that: host cells.[8] In *Diamond* v. *Chakrabarty*, 447 U.S. 303 (1980), the Supreme Court limited its analysis to whether the microorganisms claimed in Chakrabarty's patent application (analogous to the host cells claimed in the '008 patent) were to a "manufacture" or a "composition of matter" within the meaning of 35 USC 101.[9] *See Diamond* v. *Chakrabarty*, 447 U.S. at 307. It is also possible by analogy to think of a host cell as being a kind of living "machine" in the sense that it performs certain intracellular processes in the course of producing rEPO. However, that would not make the host cell any different from any mechanical machine which performs certain "intramachinery"[10] processes in the course of producing whatever the machine is designed to produce. A host cell claim does not "cover"[11] intracellular processes any more or less than a claim to a machine "covers" the process performed by that machine. We conclude that there is nothing unique or "non-traditional" about Amgen's host cell claims.

Consequently, Amgen's argument for relief under section 337(a)(1)(B)(ii) comes down to this: Chugai's process performed abroad would *infringe* the '008 patent *if* performed in the United States, because *use* of a patented *article* is *infringement* of an article claim. Therefore, Amgen argues, the article claims of the '008 patent "cover" the process performed abroad by Chugai, and importation of goods made by that process is within the terms of section 337. In view of this argument and the fact that Amgen's host cell claims are legally indistinguishable from any other article claim, the issue in this case must be phrased generally as whether section 337(a)(1)(B)(ii) was intended to prohibit the importation of articles made abroad by a process in which a *product* claimed in a U.S. patent is used, namely the new host cell.

2. *Statutory Interpretation*

The resolution of this issue turns on the interpretation of the phrase "a process covered by the claims of a * * * patent" in section 337(a)(1)(B)(ii). As in all questions of statutory construction, we look first to the plain meaning of the statutory language, and then to

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[8]Claim 4 of the '008 patent is representative of the host cell claims involved on this appeal. It reads:

> 4. A procaryotic or eucaryotic host cell transformed or transfected with a DNA sequence according to claim 1, 2 or 3 in a manner allowing the host cell to express erythropoietin [rEPO].

[9]35 USC 101 reads:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

[10]I.e., inside the machine.

[11]As that word is used in section 337(a)(1)(B)(ii). The meaning of this word in the context of the statute is discussed at length, *infra*.

other extrinsic aids such as legislative history, rules of statutory construction, and the construction placed on the statute by the agency which administers it, the ultimate objective being to discern, if possible, the intent of Congress. *Johns-Manville Corp.* v. *United States*, 855 F.2d 1556, 1559 (Fed. Cir. 1988).

The parties expend much effort trying to convince us of what exactly the plain meaning of the word "covered" is. While the meaning of this word can vary slightly depending on the context, we are of the opinion that in normal parlance among patent lawyers, to whom patent statutes are directed, a patent "covering" a process is a patent containing at least one claim defining a process.

3. *The Legislative History*

The key language in section 337(a)(1)(B)(ii) ("process covered by the claims") was originally introduced in former section 337a and was not altered by the 1988 Trade Act. Therefore, we begin our analysis of the legislative history with that of former section 337a.

Former section 337a was enacted in response to the Court of Customs and Patent Appeals' (CCPA's) decision in *In re Amtorg Trading Corp.*, 75 F.2d 826, 24 USPQ 315 (CCPA), *cert. denied*, 296 U.S. 576 (1935). In *Amtorg*, the CCPA reversed its earlier precedent and held that importing a product made abroad *by a patented process* was *not* an unfair trade practice under former section 337. *Amtorg*, 75 F.2d at 834, 24 USPQ at 323. The CCPA found nothing in the legislative history of the Tariff Act of 1930 (which enacted former section 337) which would justify extending patent protection under section 337 beyond the protection provided by substantive patent law. *Id.*

In response, several bills were introduced into Congress, the one that became former section 337a being H.R. 8285, 76th Congress. Both the House and Senate reports accompanying H.R. 8285 indicate that former section 337a was specifically directed toward *process patents* and the *Amtorg* decision.

> This bill is designed to correct the present problem which was created when the Court of Customs and Patent Appeals in the case *In re Amtorg Trading Corporation* reversed its former decisions and held that the importation of products made abroad *in accordance with a United States process patent* without consent of patentee was not regarded as an unfair method of competition. [Emphasis ours.]

H.R. Rep. No. 1781, 76th Cong., 3d Sess. 1 (1940); *see also* S. Rep. No. 1903, 76th Cong., 3d Sess. 1 (1940). There is no indication in either the House or Senate reports, or the House committee hearings report,[12] that former section 337a was intended to prohibit the im-

[12] *Importation of Goods Covered by United States Patents: Hearings on H.R. 7851 Before the House Committee on Patents Subcommittee on Phosphate Rock Process Patents*, 75th Cong., 3d Sess. (1938). H.R. 7851 was a predecessor version of H.R. 8285 which died in committee.

portation of goods made by a process which merely used abroad a product, apparatus, or material patented in this country.

Amgen contends that Congress' intent to prohibit such activity can be seen from the legislative history of the 1988 Trade Act which repealed former section 337a and created section 337(a)(1)(B)(ii). The only support which Amgen gives for this contention is the following general statement from one of the sponsors of the Trade Act, Senator Lautenberg:

> A continuing goal of Congress is to encourage innovation by providing meaningful protection for the inventions and discoveries of American inventors and for the manufacture of innovative products made by American workers. The emerging biotechnology industry has pioneered a revolutionary genetic engineering technology that produces recombinantly derived materials used to make previously unavailable products.
>
> With respect to section 1342 of the Trade Act (title 19), this bill reenacts prior section 337a of the Tariff Act of 1940 (as 337(a)(1)) which addresses protection of U.S. business from importation of products made outside of the United States by a process covered by a claim of a U.S. patent.
>
> Section 337(a)(1) (a reenactment of section 337a) will provide the assistance necessary for emerging U.S. industries, such as the biotechnology industry, to compete in a marketplace without interference due to unfair acts of foreign competitors. The continued broad jurisdiction of the International Trade Commission will help U.S. industry address the unfair activity of foreign competitors who, for example, import products manufactured using patented genetic engineering technology. Merely moving manufacture offshore does not absolve the wrongdoer from the requirement to compete fairly. This Trade Act protection prohibits the foreign enterprise from taking jobs from American workers by doing offshore that which they could not lawfully do in the United States.

This statement supports the Commission's position just as much as, if not more than, Amgen's position. As noted above, former section 337a was enacted to prohibit imports made using patented *processes*, and not to prohibit imports made by a process *using* patented *articles*. The Commission consistently interpreted and applied former section 337a in this way for over 40 years. Senator Lautenberg was certainly aware of the prior interpretation of former section 337a, yet twice states that amended section 337 merely *reenacts* former section 337a. He would not have so stated if he had intended a substantive change in its scope.

In fact, the only portion of Senator Lautenberg's statement (and of the entire legislative history of the 1988 Trade Act, for that matter) which supports Amgen's position is the last sentence: "Trade Act protection prohibits * * * doing offshore that which they could not lawfully do in the United States." However, we do not consider that what Amgen attempts to make of this single sentence, in light

of the remaining legislative history of both the 1940 enactment of former section 337a and the 1988 amendments to section 337, to be "clearly expressed legislative intention" sufficient to interpret the statute contrary to its plain meaning. *See Glaxo Operations UK Ltd.* v. *Quigg,* 894 F.2d 392, 395, 13 USPQ2d 1628, 1630 (Fed. Cir. 1990); *Johns-Manville,* 855 F.2d at 1559.[13]

It is our impression from study of this case that the possibility of doing what Chugai is doing in Japan—using Amgen's patented host cells in the larger process by which it produces rEPO through utilization of the life processes of the host cells—is something which was not considered by the Congress in connection with the 1988 revision of section 337. Consequently it did nothing to deal with the situation, which it certainly did not discuss. Amgen has emphasized that the problem it has presented is one of great importance and presents an issue "of first impression for this or any other Court." It says we are faced with "a precedent-setting question of exceptional importance." This confirms our impression that Congress did not give it a thought. If there is a need to alter the understanding of the expression "process covered by the claims," which has persisted unchanged for nearly half a century, in order to take care of Amgen's problem, it is a task for Congress,[14] which can explore its impact and side effects, and not for this court.

C. *Conclusion*

Since none of the claims of the '008 patent cover the process performed overseas by Chugai, Amgen's complaint under section 337(a)(1)(B)(ii) must be dismissed. However, the Commission should have done so on the merits, and not for lack of jurisdiction. Therefore, we vacate the Commission's April 10, 1989 Order, and remand for entry of a final determination dismissing the complaint on the merits.

COSTS

Amgen to bear the costs.

VACATED AND REMANDED

[13]Amgen also points out that 35 USC 271(g), also enacted by the 1988 Trade Act, specifically uses the phrases "process patented" and "process patent," and argues that Congress' failure to use similar language in section 337(a)(1)(B)(ii) indicates that Congress meant something different by "process covered by * * *" in section 337(a)(1)(B)(ii). We see no evidence to support Amgen's argument, and conclude that the most likely reason Congress used the particular language in section 337(a)(1)(B)(ii) was to maintain the same language used in, and consequently the same scope of, former section 337a.

[14]We are aware that the ITC decision in this case has, in fact, led to the introduction of H.R. 3957 in the present Congress, to amend, inter alia, section 337(a)(1)(B). See 39 PTC Jour. 262, 279 (BNA Feb. 8, 1990).

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Edward D. Re

Judges

James L. Watson
Gregory W. Carman
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Joseph E. Lombardi

*Judge Frederick Landis passed away on March 1, 1990.

Decisions of the United States Court of International Trade

(Slip Op. 90–36)

GOVERNMENT OF ISRAEL AND AGRICULTURAL EXPORT CO. LTD. OF ISRAEL (AGREXCO), PLAINTIFFS *v.* U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, DEFENDANT, AND ROSES, INC., INTERVENOR-DEFENDANT

Court No. 87-01-00036

MEMORANDUM

[Plaintiff's motion for judgment on the agency record denied; action dismissed.]

(Decided April 11, 1990)

Kaplan Russin & Vecchi (*Dennis James, Jr., Kathleen F. Patterson* and *Bonnie G. Nelson*) for the plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*A. David Lafer*); and Office of the Deputy Chief Counsel for International Trade, U.S. Department of Commerce (*Anne W. White*), of counsel, for the defendant.

Stewart and Stewart (*Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr.* and *Charles A. St. Charles*) for the intervenor-defendant.

AQUILINO, *Judge:* This action, which challenges *Fresh Cut Roses from Israel; Final Results of Countervailing Duty Administrative Review and Determination Not to Revoke Countervailing Duty Order*, 51 Fed. Reg. 44,498 (Dec. 10, 1986), has been reassigned to me for disposition. To this end, the plaintiffs have interposed a motion for judgment upon the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA"). The motion seeks remand to the agency for revocation of the countervailing-duty order as of September 18, 1985 in the absence of any determination by the U.S. International Trade Commission ("ITC") that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry is materially retarded, by reason of imports of the fresh-cut roses.

I

The motion shows that the countervailing-duty order issued on September 4, 1980[1] pursuant to 19 U.S.C. § 1303, and without any determination that the covered merchandise was causing injury. Thereafter, the ITA undertook an administrative review of the order pursuant to 19 U.S.C. § 1675 for the period October 1, 1981 through September 30, 1984.

By the time the final results of that review had been published, as cited above, an Agreement on the Establishment of a Free Trade Area Between the Government of the United States of America and the Government of Israel[2] had come into existence. The latter's accession to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade[3] (relating to subsidies and countervailing measures) followed, whereupon the United States announced that Israel had become a "country under the Agreement" within the meaning of 19 U.S.C. § 1671(b).[4]

The Israeli Minister (Agricultural Affairs) then requested that the ITA refer the countervailing-duty proceeding to the ITC for an injury determination. *See* record document ("R.Doc") 1. The ITC responded that it had "no authority to conduct an injury investigation in connection with this outstanding countervailing duty (CVD) order,"[5] whereupon the minister formally requested the ITA to revoke the order. *See* R.Doc 8. This request was denied per the following reasoning:

> The statutory scheme of the T[rade] A[greements] A[ct] indicates that Congress did not intend automatic revocation of countervailing duty orders issued under section 303 of the Tariff Act. If Congress had intended for such an order to be revoked, it could have explicitly provided for revocation. Instead, Congress granted a "country under the Agreement" the injury test in the limited circumstances specified in sections 102 of the TAA (to investigations in progress at the time a country becomes a "country under the Agreement"), 104(b) of the TAA (to section 303 orders in effect on January 1, 1980, if the request for the injury review were made by December 31, 1982), and section 701 of the Tariff Act (to investigations not yet filed on products from a "country under the Agreement"). Congress did not provide for an injury test in the circumstances of this case, where Israel became a "country under the Agreement" *after* issuance of the order under section 303 of the Tariff Act. To read this failure of Congress to provide for an injury test as a requirement for revocation would produce an absurd result,

[1] *See* 45 Fed. Reg. 58,516.

[2] April 22, 1985, —— U.S.T. ——, T.I.A.S. No. ——, *entered into force* Aug. 19, 1985, *reprinted in* 24 I.L.M. 653 (1985).

[3] April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, 1186 U.N.T.S. 204, *entered into force* January 1, 1980.

[4] *See* Determination Regarding the Application of Certain International Agreements, 50 Fed. Reg. 38,731 (Sept. 24, 1985).

[5] R.Doc 6.

which we cannot assume Congress intended. If we revoke the order on Israeli roses, we would be according greater rights, *i.e.*, automatic revocation, to later signatories of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade ("the Subsidies Code") (which provides "country under the Agreement" status) than to early signatories. Early signatories received the *right* to an injury review that would result in revocation only if the determination of injury were negative.[6]

II

At the time this action was commenced, seeking reversal of the foregoing rationale, courts had yet to opine on the important issue raised. However, in *Cementos Guadalajara, S.A.* v. *United States*, 12 CIT ——, 686 F. Supp. 335 (1988), and again in *Cementos Anahuac del Golfo, S.A.* v. *United States*, 12 CIT ——, 689 F. Supp. 1191 (1988), the court affirmed the ITA's position, and the U.S. Court of Appeals for the Federal Circuit in turn affirmed the decisions summarily *sub nom. Cementos Guadalajara, S.A.* v. *United States*, 879 F.2d 847 (1989), *cert. denied*, 110 S. Ct. 1318 (March 5, 1990).

In this action, the plaintiffs have made it clear that the relief they seek is prospective the moment Israel became a "country under the Agreement", and not retroactive to the date of the original ITA order. That is, they attempt, understandably, to distinguish the foregoing decisions, but in its opinion in *Cementos Guadalajara*, the Court of International Trade stated that the

> point of reference for the requirement of an injury determination before imposition of countervailing duties appears to correspond to the time when the goods are entered or imported into the United States, not when duties are finally assessed after a 751 review.

12 CIT at ——, 686 F. Supp. at 351. *Accord: Cementos Anahuac del Golfo, S.A.* v. *United States*, 12 CIT at ——, 689 F. Supp. at 1208. If this is the appropriate point of reference, the action at bar entails an administrative review of entries of fresh-cut roses during the period October 1, 1981 through September 30, 1984, which, of course, predates Israel's change of status in September 1985. Hence, the plaintiffs are not entitled to the relief they seek in the light of the above decisions.

Moreover, those cases indicate that this court lacks jurisdiction now to reach the position the plaintiffs are attempting to press. *E.g., Cementos Guadalajara, S.A.* v. *United States*, 12 CIT at ——, 686 F. Supp. at 353:

> Plaintiffs have brought their action pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, challenging the final results of the 751 review covering * * * January 1, 1984 through December 24, 1984. The final results do not address or deal with the

[6] 51 Fed. Reg. at 44,499 (emphasis in original).

subject merchandise entered after December 24, 1984. Plaintiffs' revocation request, as it deals with the order covering * * * ent[ries] after December 24, 1984, is untimely. Plaintiffs, pursuant to 19 U.S.C. § 1516a(a)(2)(A) may contest "any factual findings or legal conclusions upon which the determination is based." As set forth above, the issues of revocation, duty free liquidation, and refund of estimated duties may be raised as they pertain to factual findings or legal conclusions in the 751 review determination covering the * * * ent[ries] prior to December 25, 1984. Concerning the * * * ent[ries] in the later review periods, the ITA has not yet made any determination upon which plaintiffs may properly raise objections. Once the ITA has made a determination in these areas, then may plaintiffs challenge the determination and any results they find unsupported by substantial evidence or otherwise contrary to law.

See also Cementos Anahuac del Golfo, S.A. v. *United States,* 12 CIT at ——, 689 F. Supp. at 1206.

In sum, plaintiffs' present motion for judgment on the agency record cannot be granted by this court, and their action must therefore be dismissed.

(Slip Op. 90–37)

IPSCO, INC. AND IPSCO STEEL, INC., PLAINTIFFS, AND ALGOMA STEEL CORP., LTD., AND SONCO STEEL TUBE DIV., FERRUM, INC., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND LONE STAR STEEL CO., DEFENDANT-INTERVENOR

Court No. 86–06–00753

[Remanded.]

(Dated April 16, 1990)

Barnes, Richardson & Colburn (*Rufus E. Jarman, Jr., Josephine N. Belli*) for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Jeanne E. Davidson*), for defendant; (*Craig L. Jackson*) Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Dewey, Ballentine, Bushby, Palmer & Wood (*Michael H. Stein*) and *Akin, Gump, Strauss, Hauer & Feld* (*Warren E. Connelly, Valerie A. Slater*) for defendant-intervenor.

OPINION

RESTANI, *Judge:* Plaintiffs, Ipsco, Inc. and Ipsco Steel, Inc. (Ipsco) bring this action challenging the final determination on remand by the United States Department of Commerce, International Trade Administration (ITA or Commerce) issued on November 8, 1989. Pursuant to the order of this court in *Ipsco, Inc.* v. *United States,* 13

CIT ——, 714 F. Supp. 1211 (1989), Commerce revised its calculations and adopted a methodology which took into account the significant differences in value between prime and "limited service" oil country tubular goods (OCTG), both of which were subject to investigation. Plaintiffs agree "that the remand determination successfully carried out the instruction of the Court to the extent that it developed and utilized a reasonable methodology for determining different costs for limited service and prime OCTG, which adequately reflect the substantial differences in the market values of these two products." Ipsco Comments on Remand Determination (P. Brief) at 2.

ARGUMENTS

Plaintiffs challenge the determination, because ITA's reduction of Ipsco's average dumping margin from 33.78% to 32.63%, a mere 1.15%, was not a result, in Ipsco's view, which could have occurred if ITA had used correct data and calculations in the remand. Ipsco claims that Commerce must have erred because it "found identified limited service costs ranging between 40% and 60% of the cost of prime OCTG, with an average of about 48% of the cost of prime", *id.*, and had previously found "that 57.6% of Ipsco's margin was accounted for by sales of limited service OCTG." *Id.* Plaintiffs contend that "a reduction of the constructed value in the order of 50% would be expected to produce a far larger reduction than 1.15%." *Id.* at 3.

Ipsco contends that backup documents which it received after remand from Commerce demonstrate "that with respect to determination of constructed value of a particular grade of OCTG which was produced and sold during the first two quarters of 1985, the Department only utilized tonnage data for the first quarter of 1985", and that "[r]eview of the record indicates that the Department utilized data for the first *two* quarters of 1985 for all other grades." *Id.* [Emphasis in original]. Plaintiffs believe this to be a ministerial error likely resulting from a misordering of data by ITA, and request that ITA correct it according to section 1333(a) of the Omnibus Trade and Competitiveness Act of 1988. *Id.* at 9. The relevant portion of section 1333(a) is codified at 19 U.S.C. § 1673d(e) (1988). Plaintiffs further explain in their request to ITA for correction of the alleged error that the use of only first quarter data was a significant problem because yields were abnormally low in that quarter. P. Brief at 6.

Commerce neither confirms nor denies that it erred. It claims, rather, that plaintiffs did not give it sufficient data after remand to find any error, Defendant's Response to Ipsco's Comments upon Second Remand Determination (D. Brief) at 6 n.3, and that in any case any such error would have occurred prior to the preliminary determination. *Id.* at 5 n.2. Defendant further states that "Section 1333 merely authorized Commerce to adopt procedures to provide for the

correction of ministerial errors 'within a reasonable time' of the issuance of the final determination." D. Brief at 8. Therefore, it avers, Ipsco's request is untimely and should have been brought after the original final determination, *Antidumping; Oil Country Tubular Goods From Canada; Final Determination of Sales at Less Than Fair Value,* 51 Fed. Reg. 15,029 (April 22, 1986). Moreover, defendant claims that it is precluded from unilaterally amending a determination once the determination has been brought within the jurisdiction of the Court of International Trade. *Zenith Electronics Corp. v. United States,* 884 F.2d 556, 561–62 (Fed. Cir. 1989).[1] Intervenor agrees that if any error occurred, it occurred in the original determination and was not timely raised.

Ipsco replies that its challenge goes not to the original determination, but to the remand determination, in which ITA conducted a new and thorough investigation. Plaintiffs' Reply to Second Remand Determination Responses of Defendant and Defendant-Intervenor (P. Reply Brief) at 4–5. Plaintiffs also claim that even if ITA used the same erroneous data in the original determination, Commerce's faulty methodology masked the error, which, in and of itself, sufficiently explained the flawed dumping margin at the time. P. Brief at 7.

DISCUSSION

First, the court finds defendants' lack of position on the existence of a mistake puzzling. The governmental defendant says it cannot find if there is an error, allegedly because plaintiff has not supplied proper cities.[2] Intervenor, on the other hand, seems to know where the "error" occurred, but says it was a judgment call and not a simple clerical or ministerial error. The court is not persuaded that any acceptable judgment was made to use first quarter data only for this grade and it is unconvinced the plaintiffs' presentation was so defective that no search for error was required by ITA. In any case, if the agency charged with conducting the investigation cannot state whether or not an error exists, the court wonders how plaintiff could have found the problem after the original determination. Surely ITA can discern if it used correct tonnages and resulting cost per ton ratios in its original and remand calculations.[3]

Second, while it appears only one quarter of data was used for a particular grade of OCTG on remand, the court declines to hold that ITA in fact erred or that it should be instructed to correct the error at this point. As indicated, whether or not the alleged error was in the original determination and whether or not Ipsco could

[1]Now that the parties are before the court once more, this final argument may be of no practical moment.

[2]Plaintiffs have supplied the citations on ITA's alleged "mispagination," see P. Reply Brief at 15 n.4, but it appears that ITA was not "at sea" because of any missing cites in this regard. Plaintiffs' concerns are discernable enough that the parties were able to make many conclusions about them. If ITA needed more citations to its own record, it should have requested them. Plaintiffs' exhibit A, however, clearly refers to remand worksheet A 22 which in turn cites pages of the original record with first quarter cost and tonnage data. P. Brief, Exhibit A at 2.

[3]While both first and second quarter production data are in the original record, defendant has not provided cites to anything in the original record to show if cost of production was also calculated on first quarter data in the original investigation.

and should have discovered such error after the original final determination, has not been adequately demonstrated by ITA or by the defendant-intervenor because neither has taken a position as to whether Commerce actually used the wrong data in that determination or in the remand. This lack of direct discussion of the issue makes it difficult to reach a conclusion as to what transpired.

Third, the court cannot agree with plaintiffs at this point that it is irrelevant whether or not the error occurred in the original determination. If use of the disputed figures on tonnage or dollar to tonnage ratios derived from only first quarter data affected the potential outcome under either ITA's or plaintiffs' earlier claimed methodology, this problem should have been addressed at that time. Thus, what occurred in the original determination and immediately thereafter, and how that is reflected in the original record may be crucial. Moreover, although the remand order might have been broad enough to allow ITA to use new tonnage-related data on remand does not mean it was required to do so.[4]

Therefore, the court remands this matter to ITA to determine whether it used correct tonnage data and dollar to tonnage ratios and, if not, whether the error occurred in the original determination, whether it was germaine to the original determination, and whether Ipsco could have discovered the problem after the original determination through the exercise of the amount of diligence appropriate under the facts of the case. If ITA determines that an error was made, but was not discoverable after the original final determination with an exercise of an appropriate amount of diligence, or was irrelevant to that determination, then ITA shall recalculate the average dumping margin using the correct data. ITA shall cite the portion of the record which supports its determination. If ITA needs more information from the parties it shall request it.

ITA shall report the results of the remand to the court within 25 days of this order. Plaintiffs shall file any comments they wish to make with this court within 10 days of receipt of ITA's results, citing to any appropriate sections of the administrative record and providing copies of those sections. Defendants may respond in seven days.

[4]Obviously, the more new data is used on remand the more likely it is that counter challenges could be raised. Whatever reason ITA had for requesting more than six months of data, it would appear appropriate on remand to use already accepted data, if possible. The particular facts of a case will determine what action is appropriate to fulfill a remand order without reopening issues that should remain closed.

(Slip Op. 90–38)

MCKECHNIE BROTHERS (N.Z.) LTD., PLAINTIFF *v.* U.S. DEPARTMENT OF COMMERCE, DEFENDANT, AND CERRO METAL PRODUCTS, INTERVENOR-DEFENDANT

Court No. 85–12–01859

MEMORANDUM

[Plaintiff's motion for judgment on the agency record denied; action dismissed.]

(Decided April 18, 1990)

Bronz & Farrell (*Edward J. Farrell*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*J. Kevin Horgan* and *Velta A. Melnbrencis*); and Offices of the Deputy Chief and the Chief Counsel for Import Administration, U.S. Department of Commerce (*M. Linda Concannon* and *Matthew Jaffe*), of counsel, for the defendant.

Collier, Shannon, Rill & Scott (*David A. Hartquist* and *Jeffrey S. Beckington*) for the intervenor-defendant.

AQUILINO, *Judge:* The plaintiff has interposed a motion for judgment on the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Low Fuming Brazing Copper Rod and Wire from New Zealand; Final Determination of Sales at Less Than Fair Value*, 50 Fed. Reg. 42,580 (Oct. 21, 1985). The defendant and the intervenor-defendant have filed papers in opposition to the motion, and the defendant has also filed a motion to dismiss this action as moot.

I

In reaching the affirmative final determination indicated, the ITA disagreed with the position of the respondent (now plaintiff) on two points, namely, whether to adjust for differences in level of trade and in quantities. On each, the agency reached a negative conclusion as follows:

> * * * All of McKechnie's sales to the United States are to wholesalers. In the home market, McKechnie's sales are all to retailers. McKechnie is the only producer in New Zealand of low-fuming brazing copper rod and wire. McKechnie provided information as to the markups of wholesalers in New Zealand of other metal products which are not the subject of this investigation, but inasmuch as there is no information regarding sales in New Zealand by manufacturers of the product under investigation, there is no basis on which to quantify a level of trade adjustment.
>
> * * * * * * *
>
> * * * The verified data indicate that quantity discounts do not exist. Furthermore, the data do not contain evidence of differences in price associated with differences in quantity as required by § 353.14 of our Regulations (19 C.F.R. 353.14).[1]

[1] 50 Fed. Reg. at 42,581.

No other points of contention between agency and respondent are indicated in the final administrative analysis, and no other points are raised by the plaintiff in this action.

II

The plaintiff attempts to oppose defendant's motion by arguing that its action

> continues to be a live case for the simple reason that the [ITA]'s denial of the claimed adjustments has a continuing effect on Plaintiff. There were no claims made for the adjustments in question in the reviews because Plaintiff made a prudent business decision to alter its home market production and selling practices to eliminate those differences for which adjustments were disallowed in the LTFV determination, pending the outcome of this litigation. That is, they eliminated their home market sales to retailers and altered their production methods to sell to New Zealand wholesalers in the larger quantities associated with that changed level of trade.
>
> This business decision was in effect mandated by [the ITA]'s determination not to allow the adjustments requested. That result is ongoing and a[n ITA] determination which has a continuing effect on how Plaintiff does business should continue to be subject to review. If it is not there would simply be no review available of a determination which forced a party to alter its business practices (or assume the risk of an unfavorable litigation result) with the net result being that the [ITA] by its investigation determinations can mandate the practices of exporters without the accountability of judicial review.[2]

Rather than buttress the plaintiff, the "business decision" referred to made this action moot by eliminating the only two points of controversy. Moreover, the indication is that the step was taken before the filing of plaintiff's motion for judgment and also the conduct of administrative reviews.[3] That is, the ITA has carried out reviews of the antidumping-duty order herein pursuant to 19 U.S.C. § 1675, with their results reported at 53 Fed. Reg. 21,504 (June 8, 1988) and 54 Fed. Reg. 47,379 (Nov. 14, 1989).

Defendant's motion claims that

> there are no entries—past, present, or prospective—that can be affected by any change that may result from a possible recalculation of the original dumping margin, and any recalculation of the dumping margin will have no practical effect. The results of the reviews have in fact superceded the dumping margin established in the less-than-fair value determination.[4]

There is ample precedent in support of this position. *E.g., Fabricas El Carmen, S.A.* v. *United States,* 12 CIT ——, 680 F. Supp. 1577 (1988); *PPG Industries, Inc.* v. *United States,* 11 CIT 303, 660 F.

[2]Plaintiff's Opposition to Defendant's Motion to Dismiss, p. 2–3.

[3]Notice of the initiation of the first such review was published at 52 Fed. Reg. 2,123 (Jan. 20, 1987).

[4]Defendant's Motion to Dismiss, pp. 2–3, *citing Tai Yang Metal Industrial Co.* v. *United States,* 13 CIT ——, 712 F. Supp. 973,976 (1989).

Supp. 965 (1987); *Alhambra Foundry* v. *United States*, 10 CIT 330, 635 F. Supp. 1475 (1986); *Silver Reed America, Inc.* v. *United States*, 9 CIT 221 (1985). These cases indicate that this action is moot and that the plaintiff is left praying for an advisory opinion, which this court is not at liberty to render.

Judgment must therefore enter in favor of the defendant.

(Slip Op. 90–39)

E. GLUCK CORP., A/K/A ARMITRON CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 86–01–00032 etc.

MEMORANDUM AND ORDER

[Plaintiff's motion to extend time on suspension disposition calendar granted in part and denied in part.]

(Dated April 19, 1990)

Serko & Simon (*Leibert L. Greenberg*) for the plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*James A. Curley*) for the defendant.

AQUILINO, *Judge:* The plaintiff has presented the court with yet another (fourth) motion to extend the time during which the above action and some 22 others may remain on a suspension disposition calendar pending resolution in the light of *Belfont Sales Corp.* v. *United States*, 11 CIT 541, 666 F. Supp. 1568 (1987), *reh'g denied*, 12 CIT ——, 698 F. Supp. 916 (1988), *aff'd*, 878 F.2d 1413 (Fed. Cir. 1989), a test case which is now final.

The first such motion necessitated a conference with counsel and the issuance of slip op. 89–154, 13 CIT —— (Oct. 27, 1989), familiarity with which is presumed. The third motion required another conference (on March 14, 1990), the outgrowth of which was a 30-day extension of time.

The last motion was based on sheets listing the covered actions. Copies of those sheets form the core of the motion now at bar. They are appended hereto and also made a part hereof since their vacuity shows best why the court is compelled, again, to write to explain this disposition of plaintiff's motion when similar motions by other parties and covering hundreds of actions suspended under the same test case have been decided without ado.

Clearly, plaintiff's counsel are not prosecuting their actions with the degree of diligence required under the circumstances discussed with them at length during the court conference in October 1989 and since then. For example, the only activity inscribed on their

sheets for the action encaptioned above and those numbered 86–08–01046, 86–09–01218, 87–01–00029, 87–01–00069 and 87–02–00379 is "entries examined", and then just within the last two weeks. Not even this rudimentary, belated activity is indicated for actions 86–04–00491, 86–04–00524, 86–05–00601, 86–05–00640, 86–07–00825, 86–07–00931, 86–09–01133, 86–09–01243, 86–10–01273, 86–10–01337, 86–11–01446 and 86–12–01538. In short, plaintiff's motion leaves the court little leeway other than to rule now that any of the covered actions not disposed of or marked ready for trial by the close of business on June 1, 1990 will be subject to dismissal for lack of prosecution. Otherwise, plaintiff's motion for an extension of time until June 16, 1990 is denied.

SUSPENSION DISPOSITION CALENDAR

COURT NO.	PLAINTIFF	ATTORNEY/ADDRESS	ACTIVITY/DATE	DISMISS DATE	PORT
86-01-00032	E. Gluck a/k/a Armitron Corp.	Serko, Simon & Abbey One World Trade Center New York, NY 10048	Entries examined, Apr. 9, 1990.	Dec. 14, 1989.	New York, NY
86-04-00420	do	do	Stip filed, AAG, Dec. 1, 1989.	do	do.
86-04-00455	do	do	Stip filed, AAG, Apr. 9, 1990. Motion to sever filed, Apr. 9, 1990. Amendment filed, Apr. 12, 1990.	do	do.
86-04-00491	do	do	N/A	do	do.
86-04-00524	do	do	N/A	do	do.
86-05-00601	do	do	N/A	do	do.
86-05-00640	do	do	N/A	do	do.
86-07-00825	do	do	N/A	do	do.
86-07-00931	do	do	N/A	do	do.
~~86-08-00995~~	~~E. Gluck a/k/a Armitron Corp.~~	~~Serko, Simon & Abbey One World Trade Center New York, NY 10048~~	Suspended, Dec. 1989. Ordered, Jan. 8, 1990. Suspended under 86-01-00031, Jan. 9, 1990.	do	do.
~~86-08-01028~~	~~Novus Electronics~~	~~Serko, Simon & Abbey One World Trade Center New York, NY 10048~~	Suspended, Dec. 1989. Ordered, Jan. 9, 1990. Suspended under 86-01-00031, Jan. 9, 1990.	do	do.
86-08-01046	E. Gluck a/k/a Armitron Corp.	Serko, Simon & Abbey One World Trade Center New York, NY 10048	Entries examined, Apr. 6, 1990.	do	do.
86-09-01133	do	do	N/A	do	do.
86-09-01210	do	do	Entries examined, Apr. 6, 1990.	do	do.
86-09-01243	do	do	N/A	do	do.
86-10-01273	do	do	N/A	do	do.
86-10-01337	do	do	N/A	do	do.
86-11-01446	do	do	N/A	do	do.

86-12-01538	do	do	N/A	do	do.
87-01-00029	do	do	Entries examined, Apr. 6, 1990.	do	do.
87-01-00069	do	do	Entries examined, Apr. 11, 1990.	do	do.
87-02-00177	do	do	Entries examined, Apr. 3, 1990. Stip filed, AAG, Apr. 13, 1990. Motion to sever filed, Apr. 13, 1990.	do	do.
87-02-00372	do	do	Stip filed, AAG, Apr. 12, 1990. Motion to sever filed, Apr. 12, 1990.	do	do.
87-02-00379	do	do	Entries examined, Apr. 6, 1990.	do	do.
87-03-00536	do	do	Stip filed, AAG, Apr. 6, 1990. Motion to sever filed, Apr. 6, 1990.	do	do.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/94 4/4/90 Aquilino, J.	Alva Watch Corp.	83-8-01244	716.09-716.45 or 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/95 4/4/90 Aquilino, J.	American Creations	83-7-01058	716.09-716.45 or 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/96 4/4/90 Aquilino, J.	Delta Impex Watch	83-7-00988	716.09-716.45 or 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/97 4/4/90 Aquilino, J.	Honda Industries Inc.	83-12-01726	716.09-716.45 or 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/98 4/4/90 Aquilino, J.	World Forum Watch	83-8-01243	716.09-716.45 or 715.05 Various rates	688.45, 688.42, 688.43 or 688.36 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

C90/99 4/5/90 Carman, J.	Noss Co.	83–4–00565	668.04 Various rates	661.95 4.9%	Noss Co. v. U.S., 753 F.2d 1052 (1985)	New York New Orleans Norfolk Cleveland Houston Dayton Radiclones and parts
C90/100 4/5/90 Restani, J.	Olympus Corp.	87–8–00876	708.93 10.7%	676.54 Free of duty 685.38 4.1%	EAC Engineering v. U.S., 9 CIT 534 (1985)	New York "Olympus Optical Actuator TAOHS–PB1," etc.
C90/101 4/6/90 Restani, J.	General Instrument Corp.	86–6–00405	685.04 Various rates	676.54 Free of duty	Agreed statement of facts	El Paso Yokes and llybacks
C90/102 4/6/90 Restani, J.	J.E. Mamiye & Sons, Inc.	88–1–00037	706.61 or 706.62 20%	772.20 Free of duty	Agreed statement of facts	New York Clear plastic kits
C90/103 4/11/90 Restani, J.	Shurflo Manufacturing Co.	87–3–00455	678.50 3.9%	A683.32 Free of duty	Agreed statement of facts	Portland Drain cleaning machines
C90/104 4/12/90 Restani, J.	Bowe Co.	82–5–00628	355.25 Various rates	359.60 Various rates	Bowe Co. v. U.S., Ct. No. 83–11–01590 (July 13, 1988)	New York Asphalt roofing product, etc.
C90/105 4/13/90 Re, C.J.	Chang Hsin Inc.	85–4–00534	700.95 12.5%	700.45 10% 700.35 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87–136 (1987)	Los Angeles Leather trimmed shoes
C90/106 4/13/90 Re, C.J.	Daewoo Int'l America Corp.	81–3–00332	700.95 12.5%	700.45 10% 700.35 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87–136 (1987)	New York Leather trimmed shoes
C90/107 4/13/90 Re, C.J.	Zayre Corp.	85–12–01799	700.95 12.5%	700.45 10% 700.35 8.5%	Mitsubishi Int'l Corp. v. U.S., S.O. 87–136 (1987)	Boston Leather trimmed shoes
C90/108 4/16/90 Restani, J.	Thom McAn Shoe Co.	89–10–00553	700.62 $0.90 per pair + 20%	700.56 6%	Agreed statement of facts	Los Angeles Footwear

ABSTRACTED CLASSIFICATION DECISIONS — Continued

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C90/109 4/17/90 Restani, J.	BASF Corp.	83–3–00406	409.92, 409.90 17% or 24.9%	474.25 1.9%	BASF Wyandotte Corp. v. U.S., 855 F.2d 852 (1988)	Charlotte Gravure ink
C90/110 4/17/90 Restani, J.	Modern Publishing	89–3–00167	737.95 8.3%	256.90 5.7%	Agreed statement of facts	New York Frame tray board books
C90/111 4/17/90 Restani, J.	Viam Manufacturing, Inc.	88–7–00573	380.50 Various rates	360.83 12.1%, 10.6%, or 9.1%	Agreed statement of facts	Los Angeles Finished carpet floor mats for automobiles
C90/112 4/20/90 Restani, J.	Bellarno Int'l	86–5–00677	716.09–716.45, 720.10–720.18, 715.05 Various rates	688.40, 688.45, 688.43, or 688.42 688.36, 676.20 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.
C90/113 4/20/90 Restani, J.	Bellarno Int'l	87–3–00484	716.09–716.45, 720.10–720.18, 715.05 Various rates	688.40, 688.45, 688.43, or 688.42 688.36, 676.20 Various rates	Belfont Sales Corp. v. U.S., 878 F.2d 1413 (1989) or Texas Instruments Inc. v. U.S., 673 F.2d 1375 (1982)	New York Quartz analog watches, etc.

ABSTRACTED VALUATION DECISIONS

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
V90/18 4/5/90 Restani, J.	Sears, Roebuck & Co.	86-7-00871	American selling price	25% of difference between ASP and export value at values set forth on commercial invoices, net, packed	Agreed statement of facts	Los Angeles Footwear
V90/19 4/5/90 Restani, J.	Sears, Roebuck & Co.	86-7-00865	American selling price	25% of difference between ASP and export value at values set forth on commercial invoices, net, packed	Agreed statement of facts	Philadelphia Footwear
V90/20 4/5/90 Restani, J.	Sears, Roebuck & Co.	86-7-00866	American selling price	25% of difference between ASP and export value at values set forth on commercial invoices, net, packed	Agreed statement of facts	Los Angeles Footwear
V90/20 4/5/90 Restani, J.	Sears, Roebuck & Co.	86-7-00867	American selling price	25% of difference between ASP and export value at values set forth on commercial invoices, net, packed	Agreed statement of facts	Boston Footwear
V90/22 4/5/90 Restani, J.	Sears, Roebuck & Co.	86-7-00868	American selling price	25% of difference between ASP and export value at values set forth on commercial invoices, net, packed	Agreed statement of facts	Los Angeles Footwear
V90/23 4/5/90 Restani, J.	Sears, Roebuck & Co.	86-7-00870	American selling price	25% of difference between ASP and export value at values set forth on commercial invoices, net, packed	Agreed statement of facts	Boston Footwear

Appeals to the U.S. Court of Appeals for the Federal Circuit

A.N. Deringer, Inc. *v.* United States, 13 CIT ——, Slip Op. 89–141 (Oct. 11, 1989), *appeal docketed,* No. 90–1125 (Fed. Cir. Dec. 15, 1989).

Asociacion Colombiana de Exportadores de Flores *v.* United States, 13 CIT ——, Slip Op. 89–99 and 89–116 (July 19, and August 23, 1989), *appeal docketed,* No. 89–1748 (Fed. Cir. Sept. 29, 1989).

Asociacion Colombiana de Exportadores de Flores *v.* United States, 13 CIT ——, Slip Op. 89–147 (Oct. 19, 1989), *appeal docketed,* No. 90–1131 (Fed. Cir. Dec. 20, 1989).

Aurea Jewelery Creations, Inc. *v.* United States, 13 CIT ——, Slip Op. 89–126 (Sept. 7, 1989), *appeal docketed,* No. 90–1147 (Fed. Cir. Jan. 9, 1990).

Avesta AB *v.* United States, 13 CIT ——, Slip Op. 89–152 (Oct. 27, 1989), *appeal docketed,* No. 90–1120 (Fed. Cir. Dec. 12, 1989).

Cambridge Lee Industries, Inc. *v.* United States, 13 CIT ——, Slip Op. 89–145 (Oct. 18, 1989), *appeal docketed,* No. 90–1044 (Fed. Cir. Oct. 27, 1989).

Eastalco Aluminum Co. *v.* United States, 13 CIT ——, Slip Op. 89–148 (Oct. 19, 1989), *appeal docketed,* No. 90–1130 (Fed. Cir. Dec. 19, 1989).

E.M. Chemicals *v.* United States, 13 CIT ——, Slip Op. 89–146 (Oct. 18, 1989), *appeal docketed,* No. 90–1141 (Fed. Cir. Jan. 3, 1990).

Figure Flattery, Inc. *v.* United States, 13 CIT ——, Slip Op. 89–128 (Sept. 11, 1989), *appeal docketed,* No. 90–1079 (Fed. Cir. Nov. 17, 1989).

Former Employees of Southern Triangle Oil Co. *v.* United States, 14 CIT ——, Slip Op. 90–16 (Feb. 14, 1990), *appeal docketed,* No. 90–1262 (Fed. Cir. March 21, 1990).

Georg Muller of America *v.* United States, 13 CIT ——, Slip Op. 89–162 (Nov. 21, 1989), *appeal docketed,* No. 90–1157 (Fed. Cir. Jan. 12, 1990).

Huffy Corp. *v.* United States, 14 CIT ——, Slip Op. 90–2 (Jan. 9, 1990), *appeal docketed,* No. 90–1259 (Fed. Cir. March 21, 1990).

Libbey Glass *v.* United States, 14 CIT ——, Slip Op. 90–15 (Feb. 13, 1990), *appeal docketed,* No. 90–1295 (Fed. Cir. April 16, 1990).

Marsuda-Rodgers Int'l *v.* United States, 14 CIT ——, Slip Op. 90–35 (April 3, 1990), *appeal docketed,* No. 90–1298 (Fed. Cir. April 16, 1990).

Mattel, Inc. *v.* United States, 14 CIT ——, Slip Op. 90–09 (Jan. 31, 1990), *appeal docketed,* No. 90–1279 (Fed. Cir. April 4, 1990).

Nichimen America, Inc. *v.* United States, 13 CIT ——, Slip Op. 89–121 (August 29, 1989), *appeal docketed,* No. 90–1004 (Fed. Cir. Oct. 3, 1989).

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